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No. 85-5404

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

TERRY B. ALLEN, Petitioner

-vs-

THE PEOPLE OF THE STATE OF ILLINOIS, Respondent

PETITION FOR A WRIT OF CERTIORARI

TO THE

ILLINOIS SUPREME COURT

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QUESTIONS PRESENTED FOR REVIEW

1) Does the Fifth Amendment privilege against self-incrimination apply to proceedings under the Illinois Sexually Dangerous Persons Act, an act which provides for the indefinite incarceration of persons found to be sexually dangerous?

2) May Illinois compel a defendant in a sexually dangerous person proceeding to answer incriminatory questions and use the defendant's admissions as a basis for committing him to the Department of Corrections for an indeterminate period of time?

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TERRY B. ALLEN, Petitioner

-vs-

THE PEOPLE OF THE STATE OF ILLINOIS, Respondent

PETITION FOR A WRIT OF CERTIORARI

TO THE

ILLINOIS SUPREME COURT

PRAYER

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

May It Please the Court:

The petitioner, Terry B. Allen, respectfully prays that a writ of certiorari issue to review the judgment of the Illinois Supreme Court.

OPINION BELOW

The opinion of the Illinois Supreme Court, People v. Allen, ___ Ill. 2d ___, ___ N.E.2d ___ (No. 60184, July 17, 1985) has not been published yet in the reporters. A slip opinion appears at Appendix A.

JURISDICTION

The opinion of the Illinois Supreme Court affirming Petitioner's commitment was entered on July 17, 1985. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3). This petition is filed within 60 days of the opinion of the Illinois Supreme Court.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

Sexually Dangerous Persons Act, Article 105 of the Illinois Code of Criminal Procedure, Ill. Rev. Stat. 1981, ch. 38, §105-1.01 et seq.). (See Appendix B).

STATEMENT OF THE CASE

Terry B. Allen was committed to the Department of Corrections as a sexually dangerous person for an indeterminate period of time. Proof of his status as a sexually dangerous person was based upon statements and admissions he made to two psychiatrists in separate compulsory examinations. Mr. Allen maintained in the trial court and on appeal that the use of his compulsory statements violated his Fifth Amendment privilege against self-incrimination (R87, 260; See Slip op. at 2). The Illinois Supreme Court, however, held that "there is no privilege against self-incrimination in sexually dangerous person proceedings" and that "defendants must answer all questions at such examinations regardless of the possible incriminatory nature of the answers." (Slip op. at 7-8).

The instant case was initiated as a criminal prosecution. Mr. Allen was charged by information with unlawful restraint and deviate sexual assault. Based on these charges, the State then filed a petition to have petitioner declared a sexually dangerous person under Article 105 of the Code of Criminal Procedure (Ill. Rev. Stat. 1981, ch. 38, §105) (See Appendix B). That petition required proof of: (1) the existence of a mental disorder for more than one year; (2) the existence of criminal propensities to the commission of sex offenses; and (3) the existence of demonstrated propensities towards acts of sexual assault (Ill. Rev. Stat. 1981, ch. 38, §105-1.01; Slip op. at 8). While the petition was pending, a preliminary hearing on charges in the information was held and the charges were dismissed for lack of probable cause. Defendant was then indicted and the petition was reinstated. The court ordered defendant, who was in custody, to submit to two psychiatric examinations (Slip op. at 1-2).

Mr. Allen was tried before the court on the petition, having previously waived his right to a jury determination of his

status. The two psychiatrists who conducted the court-compelled psychiatric examinations and the victim of the alleged assault were the only witnesses to testify. Both doctors opined that defendant was suffering from a mental disorder and had criminal propensities towards committing sexual assaults. Their opinions were based almost entirely upon defendant's statements and admissions made during the interviews about his sexual misconduct and the pending criminal charges (Slip op. at 2). (The defendant has no criminal record of any sex offense.)

The alleged victim of the assault was Christine Ray. She testified that she conversed with defendant about 30 to 45 minutes at a McDonald's Restaurant where she had been working. After the conversation ended, Ray left in her automobile and noticed the defendant was in her back seat. The defendant asked her to take him to "a romantic place -- or else". Ray drove to an airport parking lot where the defendant lay on top of her and simulated intercourse, although both were fully clothed. After defendant removed his pants, Ray manipulated his penis manually, agreeing to satisfy defendant if he would let her leave. According to Ray, defendant then pushed her head down, forcing her to perform fellatio. Ray subsequently entered the parking terminal alone to pay the parking fee. She told the attendant that a man had forced her to go to the airport, but she made no other attempts to summon help. Ray returned to the car and gave defendant a ride to his friend's home (Slip op. at 3-4).

Based upon the testimony of the three State witnesses, the trial court found defendant to be a sexually dangerous person and committed him to the Department of Corrections for an indefinite period of time. Under Illinois law, Mr. Allen can obtain his release and discharge only if it is proven by a preponderance of the evidence that he is no longer sexually dangerous (Ill. Rev. Stat. 1981, ch. 38, §105-9) (See Appendix B).

On appeal before the Third District Appellate Court, defendant's commitment was reversed. The court reasoned that the admission of the psychiatrist's conclusions violated defendant's privilege against self-incrimination since they were based solely on defendant's compelled inculpatory statements. People v. Allen, 123 Ill. App. 3d 669, 463 N.E.2d 135 (3d Dist. 1984). The State, however, was allowed leave to appeal in the Illinois Supreme Court and defendant's commitment was reinstated. People v. Allen, ___ Ill. 2d ___, ___ N.E.2d ___ (1985). As initially noted above, the Illinois Supreme Court held that there is no privilege against self-incrimination in a sexually dangerous person proceeding.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT THIS WRIT TO CONSIDER AS A MATTER OF FIRST IMPRESSION THE IMPORTANT AND UNJUST HOLDING OF THE ILLINOIS SUPREME COURT THAT THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION DOES NOT APPLY TO A SEXUALLY DANGEROUS PERSON PROCEEDING. THE COURT'S HOLDING OFFENDS THE PURPOSE OF THE FIFTH AMENDMENT PRIVILEGE; IT COMPELS DEFENDANTS CHARGED TO BE SEXUALLY DANGEROUS TO ANSWER INCRIMINATORY QUESTIONS AND PERMITS THEIR ANSWERS TO BE USED AS A BASIS FOR COMMITTING THEM TO THE DEPARTMENT OF CORRECTIONS FOR AN INDETERMINATE PERIOD OF TIME.

Terry Allen was and remains committed to the Illinois Department of Corrections for an indeterminate period of time as a sexually dangerous person. His commitment was the direct result of statements and admissions he made while in custody during a court-compelled psychiatric examination about pending criminal charges and purported past sexual misconduct. In upholding his commitment, the Illinois Supreme Court held that "defendants must answer all questions at such examinations

regardless of the possible incriminatory nature of the answers" since "there is no privilege against self-incrimination in sexually dangerous person proceedings" (Slip op. at 7-8). Petitioner urges this Honorable Court to allow this Petition and review this case. The Fifth Amendment privilege against self-incrimination should be held to apply through the due process clause to a proceeding which results in a loss of liberty for an indeterminate period, i.e., until the defendant can prove that he is no longer sexually dangerous.

The Illinois Supreme Court reasoned that the privilege against self-incrimination does not apply because sexually dangerous person proceedings are civil in nature (Slip op. at 5-6). As this Court, however, explained in In re Gault, 387 U.S. 1, 49, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967),

> [T]he availability of the privilege against self-incrimination does not turn upon the type of the proceeding in which its protection is involved, but upon the nature of the statement and the exposure which it invites.

Since, as defendant will show, his compelled statements were used to prove he was a sexually dangerous person and resulted in the loss of his liberty, the privilege should be held to apply.

Mr. Allen was originally charged in a criminal prosecution with the crimes of deviate sexual assault and unlawful restraint. Based on these charges, the State then filed a Petition to have him declared a Sexually Dangerous Person. That Petition, as noted by the court below, required proof of: (1) the existence of a mental disorder for more than one year; (2) the existence of criminal propensities to the commission of sex offenses, and (3) the existence of demonstrated propensities towards acts of sexual assault (Ill. Rev. Stat. 1981, ch. 38, §105-1.01). (Slip op. at 8). Mr. Allen, who was in custody at the time, was then compelled to submit to two psychiatric examinations. Defendant complied with the court's order, and the admissions and

statements he made about the charged crimes and purported prior sexual misconduct were used to prove he was sexually dangerous. Based upon defendant's admissions, the doctors opined that Mr. Allen was suffering from a mental disorder, that he had criminal propensities to commission of sex offenses and that he had demonstrated propensities towards acts of sexual assault (Slip op. at 2; R130-131).

Defendant's compelled admissions were thus used against him to prove he was a sexually dangerous person. Moreover, the exposure of his compelled statements resulted in a drastic impairment of his liberty and reputation. A person found to be sexually dangerous is committed to the Department of Corrections for an indeterminate period and cannot obtain his freedom until he can prove by a preponderance of the evidence that he is no longer sexually dangerous. Ill. Rev. Stat. 1981, ch. 38, §105-9; People v. Parrott, 108 Ill. App. 3d 222, 438 N.E.2d 1313, 1315-1316 (3d Dist. 1982). Additionally, an adjudication of sexual dangerousness is damning. People v. Pembrock, 62 Ill. 2d 317, 342 N.E.2d 28, 29 (1976) (commitment as a sexually dangerous person involves a "drastic impairment of the liberty and reputation of an individual"). A person adjudged to be sexually dangerous in Illinois is routinely sent to the Menard Psychiatric Center, a maximum-security institution in southern Illinois. The Center, originally a part of the Menard Correctional Center built in 1878, was set aside as a separate facility in 1933. In addition to sexually dangerous persons, the Center houses residents referred from other correctional institutions for psychiatric treatment and long-term sex offenders who volunteer for placement at the Center. All of the residents of the Center are housed in single-occupancy, maximum-security cells. Directory of Juvenile and Adult Correctional Agencies, at Ill. 115 (American Correctional Association 1984).

In United States ex rel. Stauchulak v. Coughlin, 520 F.2d 931 (7th Cir. 1975), the court recognized that an adjudication under the Illinois Sexually Dangerous Persons Act involved a drastic impairment of liberty and reputation. In holding the federal constitution requires that the reasonable doubt standard apply to an Illinois sexually dangerous person proceeding, the court compared the Illinois proceeding to a juvenile delinquency proceeding as follows:

> Here, the loss of liberty is as great, if not greater, than the loss in [a juvenile proceeding]. The violator of the criminal law--be he an adult or juvenile--is imprisoned, if at all, in almost all cases for a definite term. The person found to be sexually dangerous, in stark contrast, is committed for an indeterminate period and is unable to attain his freedom until he can prove that he is no longer sexually dangerous. Likewise with respect to stigma an involuntary commitment for sexual dangerousness presents an a fortiori case: Unlike the delinquency proceedings ..., these actions are not confidential, and an adjudication of sexual dangerousness is certainly more damning than a finding of juvenile delinquency. 520 F.2d at 935-936.

The comparison between a juvenile proceeding and a sexually dangerous person proceeding is a valid one. In Gault, the Court held that the privilege against self-incrimination applies to a juvenile proceeding. 387 U.S. at 55. A similar conclusion is required here where the loss of liberty and reputation is even greater.

Moreover, the fact that "treatment" accompanies commitment of a sexually dangerous person is of no significance since the commitment is a deprivation of liberty. As the Court noted in Gault:

> [Commitment] is incarceration against one's will, whether it is called "criminal" or "civil". And our Constitution guarantees that no person shall be "compelled" to be a witness against himself when he is threatened with deprivation of his liberty...

387 U.S. at 50. See Estelle v. Smith, 451 U.S. 454, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981) (privilege applies to compulsory psychiatric examinations utilized for the purpose of determining

punishment in a sentencing hearing); Specht v. Patterson, 386 U.S. 605, 87 S. Ct. 1209, 18 L. Ed. 2d 326 (1967) (due process requires that the right to counsel, the right to a hearing and the right to confrontation apply to state proceeding for indeterminate commitment of convicted sex offenders).

The Supreme Court of Illinois also reasoned that the privilege against self-incrimination should not apply because other procedural safeguards, such as the right to a jury trial, the requirement of proof beyond a reasonable doubt, and the right to confront witnesses, rendered the proceeding reliable. The Court felt that the privilege was not primarily concerned with reliability of the proceedings, but is instead designed to check the power of the State over the individual.

The Illinois Court's reasoning, however, is faulty. As the Court in Gault noted, reliability is a concern of the privilege since "a person, especially one of defective mentality or peculiar temperament, may falsely acknowledge guilt." 387 U.S. at 44-45 (Citations omitted).[1] Moreover, the right to a jury, the requirement of proof beyond a reasonable doubt, and the right to confront witnesses are essentially meaningless if the State

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[1]The Court also stated the following:

> The privilege against self-incrimination is, of course, related to the question of the safeguards necessary to assure that admissions or confessions are reasonably trustworthy, that they are not the mere fruits of fear or coercion, but are reliable expressions of the truth. The roots of the privilege are, however, far deeper. They tap the basic stream of religious and political principle because the privilege reflects the limits of the individual's attornment to the state and--in a philosophical sense--insists upon the equality of the individual and the state. In other words, the privilege has a broader and deeper thrust than the rule which prevents the use of confessions which are the product of coercion because coercion is thought to carry with it the danger of unreliability. One of its purposes is to prevent the state, whether by force or by psychological domination, from overcoming the mind and will of the person under investigation and depriving him of the freedom to decide whether to assist the state in securing his conviction. 387 U.S. at 47.

can compel the accused to confess to state psychiatrists. Indeed the State, under a logical extension of the holding on this case, could call the defendant himself as a witness and compel him to confess on the witness stand, i.e., make admissions that he has criminal propensity to the commission of sex offenses and has demonstrated these propensities.

Finally, the Illinois Supreme Court reasoned that the State's interest in protecting the public from sexually dangerous persons would be almost totally thwarted by application of the self-incrimination privilege in sexually dangerous person proceedings. This reasoning, however, is faulty since the State can criminally prosecute anyone who demonstrates a propensity to commit sexual assaults. Moreover, prior convictions can be admitted in a sexually dangerous proceeding as substantive proof of an accused's propensities towards the commission of sex offenses. Ill. Rev. Stat. 1981, ch. 38, §105-5. Consequently, the public is protected, especially against repeat offenders. It must be emphasized, however, that Terry Allen has no record of a prior sex offense.

The holding in this case thus is not necessary to protect the public. Indeed the holding has a drastic consequence which threatens citizens: it creates an incentive for the prosecution to file a sexually dangerous person petition in cases where it feels it does not have sufficient evidence to convict for the original offense charged. By filing a petition, the State can force the defendant to be a witness against himself, causing the deprivation of his own liberty. This is precisely what occurred here since the criminal charges were originally dismissed against Terry Allen after probable cause could not be established at a preliminary hearing.

CONCLUSION

This Court should grant a Writ of Certiorari in this case to correct the erroneous and unjust holding by the Illinois Supreme Court. As noted by the Court in Malloy v. Hogan, 378 U.S. 1, 7, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964) "the American system of ... prosecution is accusatorial, not inquisitorial." The Illinois procedure which allows the indeterminate loss of liberty and stigmatization as a sexually dangerous person is wholly inquisitorial and offends the Fifth Amendment.

Respectfully submitted,

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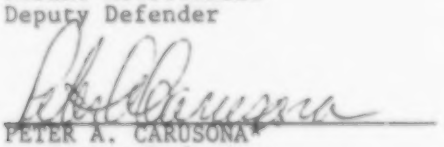

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APPENDIX A

Docket No. 60184—Agenda 4—March 1985.

THE PEOPLE OF THE STATE OF ILLINOIS, Appellant, v. TERRY B. ALLEN, Appellee.

JUSTICE MORAN delivered the opinion of the court:

Defendant, Terry B. Allen, was charged by information in the circuit court of Peoria County with the crimes of unlawful restraint and deviate sexual assault. The State then filed a petition to have defendant declared a sexually dangerous person pursuant to article 105 of the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1981, ch. 38, par. 105—1.01 *et seq.*). While the sexually dangerous person petition (petition) was pending a preliminary hearing was held on the information, and the charges were dismissed for lack of probable cause. Defendant was then indicted and the petition reinstated.

Before trial on the indictment, a bench trial was held on the petition. The trial court found defendant to be a sexually dangerous person. After his post-trial motions were denied defendant appealed. The appellate court, with one dissent, reversed, holding that (1) the trial court had improperly relied upon testimony obtained in violation of defendant's privilege against self-incrimination, and (2) the State was required to prove multiple acts of sexual assault in order to show that defendant was a sexually dangerous person as defined in the statute. (123 Ill. App. 3d 669.) We granted the State's petition for leave to appeal.

On appeal the State raises three issues, but two of these issues present the identical question. They can therefore be condensed as follows: (1) Are *Miranda* warnings required before a defendant may be examined by a psychiatrist pursuant to a court order in a sexually dangerous person proceeding? and (2) Did the defendant waive any privilege against self-incrimination which he may have had? The defendant, on cross-appeal, raises a third issue: Did the State prove beyond a reasonable doubt that the defendant was a sexually dangerous person as defined by statute?

Defendant was formally charged with unlawful restraint and deviate sexual assault. The State then filed the sexually dangerous person petition. With the defendant and defense counsel both present, the court ordered defendant to submit

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to two psychiatric examinations. No court reporter was present at this hearing, but the written order for the hearing states that the procedure and rights under the sexually dangerous persons statute were explained to the defendant and the defendant indicated that he understood the nature of the proceedings.

On March 4, 1983, the defendant was tried under the petition in a bench trial. The State presented three witnesses, but the defendant did not produce any evidence. The State's first witness was Dr. Bradford Colen, a psychiatrist who had interviewed defendant. Defendant objected to Dr. Colen's testimony, claiming that the doctor had elicited information from him in violation of his privilege against self-incrimination. Aside from some observations about the defendant's appearance and his apparent confusion and vagueness, Dr. Colen's testimony was based almost entirely upon defendant's statements and admissions made during the interview. The trial court ruled that defendant's statements to Dr. Colen were not admissible into evidence, but allowed the doctor to give an opinion based upon his overall interview with defendant. His opinion was that defendant was mentally ill with criminal propensities to commit sex crimes.

The State's next witness was Dr. Mortimer Beck, another psychiatrist, who had examined defendant. The trial judge again refused to allow into evidence the defendant's statements to the psychiatrist, but allowed Dr. Beck to express an opinion which was based "to a great extent" upon defendant's statements and admissions during his interview. Dr. Beck's opinion was that defendant was suffering from a mental disorder and had criminal propensities toward committing sexual assaults.

The State's final witness was Christine Ray, the victim of the alleged assault. Ray worked at a McDonald's restaurant in Peoria, and had noticed the defendant in the restaurant on October 11, 1982. She had spoken briefly to him while she was cleaning tables. After she got off work, at about 6 p.m., she sat down in a booth. Defendant came up and asked Ray if he could join her. She agreed, and the two talked for approximately 30 to 45 minutes. At some point in the conversation Ray described her automobile to defendant and mentioned the general location at which it was parked.

After ending the conversation Ray went into the restroom. When she emerged defendant was no longer in the restaurant. She went out to her automobile, where she dis-

covered that she had left one of the doors unlocked. She got in, started the car, and pulled out of the parking lot. When she stopped at the first stop sign she noticed that defendant was in the back seat of her car.

At this point, Ray testified, defendant asked her to take him to "a romantic place." She asked him where to go and he replied "a romantic place—or else." His tone of voice, she testified, was "kind of threatening type."

At defendant's request, Ray drove to the airport. After reaching the airport she drove around the parking area a few times until defendant told her to pull into the parking lot. She pulled up to the parking gate and opened the door to reach for the parking ticket. As she reached for the ticket defendant reached over and grabbed her on the neck or shoulder. He let go, however, and she got back in the car. Defendant then climbed over into the front seat.

Ray parked the car, and defendant asked her to lift the steering wheel and put the seat back. After doing so, Ray testified, defendant "grabbed me by the legs, set them up in the front seat." He then pulled her to a prone position and lay on top of her, simulating intercourse even though both were fully clothed.

Next, Ray testified, defendant took off his pants and asked her to take hers off also. She said no, whereupon "he reached for them, tugged them off a little bit. I finally decided to take them off." When asked by the prosecutor why she took off her pants Ray replied, "Due to the fact that he was going to get them off whatever way he wanted, anyhow."

Defendant again simulated intercourse, although Ray was still wearing panty-hose. After a short time he stopped, and asked Ray if she would perform fellatio on him. Ray said no, whereupon defendant insisted that she would. Ray asked if she could leave, to which defendant replied "after he was satisfied." Ray testified that she finally agreed to satisfy defendant if he would let her leave.

Ray then proceeded to manipulate defendant's penis manually. She testified that defendant pushed her head down, forcing her to perform fellatio. She tried to resist but, because of an injury sustained in football while in school, was unable to do so.

Ray then again asked defendant if she could leave, and he agreed. With defendant still in the car she drove to the parking lot gate. Both of them exited the car, and Ray locked the car and entered the terminal to pay the parking

fee. While in the terminal she told the woman who took her parking fee that a man had forced her to go to the airport, but Ray testified that she realized that the woman was not going to call airport security. She made no other attempt to summon help before returning to the car. She then gave defendant a ride to a trailer where he said a friend of his lived.

On redirect examination Ray testified that she had asked defendant several times if she could leave, and each time defendant told her that she could not leave until "he got what he wanted." She did, however, admit that her fear of defendant was based in part upon her experiences with another man:

> "I had a fiancee and he had a drinking problem, and you went along with him, or you might have been dead, and I learned that if you halfway go along with a person to a point, that chances are you will get out of it okay, but it was a fifty-fifty chance, and I was hoping that this guy was, at least, partially like the guy that I had had all my experience with."

In *People v. English* (1964), 31 Ill. 2d 301, this court held that sexually dangerous persons proceedings, while similar to criminal proceedings, were nonetheless essentially civil in nature. This was so even though the interests at stake mandated stricter procedural safeguards than in an ordinary civil proceeding:

> "Since the Sexually Dangerous Persons Act provides for involuntary confinement, although it be for the treatment of the defendant rather than punishment for a crime, it is natural that some of the same safeguards which are applicable in a criminal prosecution be applied to the proceedings under the act. This does not mean, however, that the commitment proceeding is a criminal prosecution or that criminal procedure as a whole must be followed in the proceeding." (31 Ill. 2d 301, 304.)

See also *People v. Studdard* (1972), 51 Ill. 2d 190, 196.

This aspect of *English* has not been affected by subsequent cases. Although the fact that incarceration may result is relevant to the question of whether or not the self-incrimination privilege applies (*In re Gault* (1967) 387 U.S. 1, 50, 18 L. Ed. 2d 527, 558-59, 87 S. Ct. 1428, 1455), it is clear that "the fact that a proceeding will result in loss of liberty does not *ipso facto* mean that the proceeding is a 'criminal prosecution'." (*Middendorf v. Henry* (1976), 425 U.S. 25, 37, 47 L. Ed. 2d 556, 566, 96 S. Ct. 1281, 1289.) In *Minnesota v.*

Murphy (1984), ___ U.S. ___, 79 L. Ed. 2d 409, 104 S. Ct. 1136, the Supreme Court applied the principle in *Middendorf* to the privilege against self-incrimination. After holding that the revocation of probation was not a criminal proceeding, the court then ruled that a defendant cannot claim the privilege merely because his answer to a question might result in revocation of his probationary status. (___ U.S. ___, ___ & n.7, 79 L. Ed. 2d 409, 424-25 & n.7, 104 S. Ct. 1136, 1146-47 & n.7.) However, a defendant may still refuse to answer questions if the answers could be used to implicate him in a separate criminal offense. ___ U.S. ___, ___ & n.7, 79 L. Ed. 2d 409, 424-25 & n.7, 104 S. Ct. 1136, 1146-47 & n.7.

The holding that sexually dangerous persons proceedings are not criminal prosecutions was also not altered by *People v. Pembrock* (1976), 62 Ill. 2d 317. In *Pembrock* this court ruled that because of the liberty interests at stake in a sexually dangerous person proceeding, due process required that the State prove the defendant's status beyond a reasonable doubt. (62 Ill. 2d 317, 321.) This holding has since been incorporated into the statute. (Ill. Rev. Stat. 1983, ch. 38, par. 105–3.01.) *English*, however, recognized that the liberty interest at stake in such a proceeding required strict procedural safeguards, but held that not all criminal procedural safeguards need be applied. (*People v. English* (1964), 31 Ill. 2d 301, 304.) *Pembrock*, which requires only one particular procedural safeguard, is not inconsistent with *English*.

We see no reason now to disturb that part of *English* which held that a sexually dangerous person proceeding is not a criminal prosecution. A person found to be sexually dangerous is to receive "care and treatment *** designed to effect recovery." (Ill. Rev. Stat. 1983, ch. 38, par. 105–8.) Upon recovery the defendant is released from custody and the information or indictment which led to his commitment is quashed. (Ill. Rev. Stat. 1983, ch. 38, par. 105–9.) Since treatment, not punishment, is the aim of the statute, the legislative determination that the proceedings are civil in nature (Ill. Rev. Stat. 1983, ch. 38, par. 105–3.01) is eminently reasonable. See *Addington v. Texas* (1979), 441 U.S. 418, 428, 60 L. Ed. 2d 323, 332, 99 S. Ct. 1804, 1810; *Tippett v. State of Maryland* (4th Cir. 1971), 436 F.2d 1153, 1159, *cert. dismissed sub nom. Murel v. Baltimore City Criminal Court* (1972), 407 U.S. 355, 32 L. Ed. 2d 791, 92 S. Ct. 2091; *French v. Blackburn* (M.D.N.C. 1977), 428 F. Supp. 1351, 1359 *aff'd* (1979), 443 U.S. 901, 61 L. Ed. 2d

869, 99 S. Ct. 3091; *Cramer v. Tyars* (1979), 23 Cal. 3d 131, 137-38, 588 P.2d 793, 796-97, 151 Cal. Rptr. 653, 656-57; *People v. Poggi* (1980), 107 Cal. App. 3d 581, 586, 165 Cal. Rptr. 758, 760; *In re Beverly* (Fla. 1977), 342 So. 2d 481, 488-89; *Commonwealth v. Barboza* (1982), 387 Mass. 105, ___, 438 N.E. 2d 1064, 1069, *cert. denied* (1982), 459 U.S. 1020, 74 L. Ed. 2d 516, 103 S. Ct. 385; *In re Matthews* (1980), 46 Or. App. 757, 762, 613 P.2d 88, 91, *cert. denied* (1981), 450 U.S. 1040, 68 L. Ed. 2d 237, 101 S. Ct. 1757; *Moss v. State* (Tex. Civ. App. 1976), 539 S.W.2d 936, 945-48.

The appellate court believed that *People v. Capoldi* (1957), 10 Ill. 2d 261, applied the privilege against self-incrimination to these proceedings. (123 Ill. App. 3d 669, 671.) This interpretation is erroneous, especially since *English*, decided after *Capoldi*, specifically held that the privilege did not apply. *Capoldi* held only that the State must make a preliminary showing as to the voluntariness of admissions sought to be introduced in a sexually dangerous person proceeding. (10 Ill. 2d 261, 268.) Voluntariness and the self-incrimination privilege are separate issues, however, and in this case the in-court warnings to defendant and the fact that he was represented by counsel convince us that the preliminary showing of voluntariness was indeed made. Had the defendant claimed that the statements to the psychiatrists were involuntary then *Capoldi* might entitle him to a preliminary hearing on the question (10 Ill. 2d 261, 267-68), but since defendant does not claim that the statements were involuntary then *English*, and not *Capoldi*, applies.

The holding that the privilege against self-incrimination is not required in the proceedings in question is supported by the subsequent ruling in *Mathews v. Eldridge* (1976), 424 U.S. 319, 47 L. Ed. 2d 18, 96 S. Ct. 893. *Eldridge* set out the factors relevant to the evaluation of a procedural due process claim:

> "[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." 424 U.S. 319, 335, 47 L. Ed. 2d 18, 33, 96 S. Ct. 893, 903.

While the private interest involved in the instant proceeding is great, there are already numerous safeguards en-

suring reliability, including the right to a jury trial (Ill. Rev. Stat. 1983, ch. 38, par. 105—5), the requirement of proof beyond a reasonable doubt (Ill. Rev. Stat. 1983, ch. 38, par. 105—3.01), and the right to confront witnesses (*People v. Nastasio* (1960), 19 Ill. 2d 524). The privilege against self-incrimination would add little more reliability to the proceedings, especially since the privilege is not primarily concerned with reliability but is instead designed to check the power of the State over the individual. *In re Gault* (1967), 387 U.S. 1, 47, 18 L. Ed. 2d 527, 557, 87 S. Ct. 1428, 1454.

Finally, the State has a substantial interest in treating as well as protecting the public from sexually dangerous persons, an interest which would be almost totally thwarted by a strict application of the self-incrimination privilege in such proceedings. If a defendant is allowed to refuse to answer questions asked during the psychiatric interview then it would be nearly impossible for the State to determine whether or not the defendant was sexually dangerous. Since the self-incrimination privilege would be a great burden to the State while being of minimal value in assuring reliability, the *Eldridge* test totally supports the holding in *English* that due process does not require the application of the privilege.

Since there is no privilege against self-incrimination in sexually dangerous person proceedings there is no need for *Miranda* warnings to be given. At this stage no criminal proceeding is involved. Therefore the appellate court's reliance upon *Estelle v. Smith* (1981), 451 U.S. 454, 68 L. Ed. 2d 359, 101 S. Ct. 1866, is misplaced. In *Estelle v. Smith* the court held that *Miranda* warnings must be given when the defendant's statements to a court-appointed psychiatrist are used against him in the death penalty phase of a criminal prosecution. (451 U.S. 454, 468-69, 68 L. Ed. 2d 359, 372-73, 101 S. Ct. 1866, 1876.) However, if the use of such statements is confined to noncriminal proceedings, no *Miranda* issue arises. 451 U.S. 454, 465, 68 L. Ed. 2d 359, 370, 101 S. Ct. 1866, 1874.

While we agree with the holding in *English* that sexually dangerous persons proceedings are not criminal proceedings, we disagree with the *English* court insofar as it would allow a defendant to refuse to answer questions which may incriminate him. (*People v. English* (1964), 31 Ill. 2d 301, 307-08.) To allow even such a limited privilege would unduly frustrate the purposes of the sexually dangerous persons provisions by making it nearly impossible to identify sexually

dangerous persons. Moreover, such a privilege is not necessary to protect the defendant's fifth amendment rights. As *Estelle v. Smith* makes clear, courts may simply exclude the defendant's compelled testimony from use in subsequent criminal proceedings. (*Estelle v. Smith* (1981), 451 U.S. 454, 468-69, 68 L. Ed. 2d 359, 372-73, 101 S. Ct. 1866, 1876.) We therefore hold that a defendant's statements to a psychiatrist in a compulsory examination under the provisions here involved may not be used against him in any subsequent criminal proceedings. Consequently, defendants must answer all questions at such examinations regardless of the possible incriminatory nature of the answers.

Accordingly, the appellate court erred when it barred the use of testimony based upon defendant's statements to Dr. Colen and Dr. Beck. It would have been proper to allow into evidence both the statements themselves and the psychiatrists' conclusions based thereon.

We need not reach the issue of whether or not defendant waived his privilege against self-incrimination. Our holding that he did not have such a privilege in this type of proceeding makes a discussion of waiver unnecessary.

Defendant also argues, and the appellate court apparently agreed, that the statute here involved requires that the State demonstrate more than one actual act of sexual assault or sexual molestation. The State, on the other hand, claims that the statute requires only a showing of "propensity," and does not require that the State prove any actual crime. In our view, neither position is supported by the statutory language.

Section 1.01 of the Sexually Dangerous Persons Act defines sexually dangerous persons as follows:

> "All persons suffering from a mental disorder, which mental disorder has existed for a period of not less than one year, immediately prior to the filing of the petition hereinafter provided for, coupled with criminal propensities to the commission of sex offenses, and who have demonstrated propensities toward acts of sexual assault or acts of sexual molestation of children, are hereby declared sexually dangerous persons." (Ill. Rev. Stat. 1983, ch. 38, par. 105—1.01.)

In *People v. Pembrock* (1976), 62 Ill. 2d 317, 321-22, the court construed this language as requiring proof of three separate elements:

> "(1) the existence of a mental disorder for more than one year; (2) the existence of criminal propensities to the

commission of sex offenses; and (3) the existence of demonstrated propensities toward acts of sexual assault or acts of sexual molestation of children."

It is clear, therefore, that the statute requires more than the proof of mere "propensity"; it also requires that the State prove that the defendant has "demonstrated" this propensity. This language can only mean that the State must prove at least one act of or attempt at sexual assault or sexual molestation.

There is, however, nothing in the statute requiring the State to prove multiple sex crimes. One purpose of the statute is to prevent mentally ill persons from being held criminally responsible for crimes committed while mentally ill. (*People v. Studdard* (1972), 51 Ill. 2d 190, 196; *People v. Sims* (1943), 382 Ill. 472, 476.) It would be illogical to construe the statute to require that a defendant cannot be treated until he has committed more than one assault. Furthermore, the statute is primarily concerned with prediction of the defendant's future conduct; the requirement that the defendant must have "demonstrated" his propensities means only that the commitment order cannot be based *solely* on psychological speculation. We therefore hold that the plural language of the statute—"acts of sexual assault or acts of sexual molestation"—refers to the defendant's future propensities, not to the demonstrated conduct.

We must, however, address the further issue, raised on cross-appeal, of whether the evidence at trial establishes even one act of sexual assault. Therefore, the sole evidence of a sexual assault was Christine Ray's testimony. Sexual assault, at the time of the alleged crime, required a sexual act achieved by "force or threat of force." (Ill. Rev. Stat. 1983, ch. 38, par. 11—3, now repealed and replaced by Ill. Rev. Stat., 1984 Supp., ch. 38, par. 12—13, which contains a similar requirement.) Defendant claims that the evidence does not establish beyond a reasonable doubt that he used force upon Christine Ray, or threatened her with force. It is for the trier of fact, however, to determine the weight and sufficiency of the evidence, and the reviewing court should not substitute its judgment for the trier of fact unless the evidence is so improbable as to raise a reasonable doubt of guilt. (*People v. Molstad* (1984), 101 Ill. 2d 128, 133; *People v. Davis* (1983), 95 Ill. 2d 1, 27.) In this case we are convinced that there was sufficient evidence for the trial court to find that defendant forced Christine Ray to perform sexual acts.

First of all, defendant's unannounced appearance in Ms. Ray's automobile indicated potential hostility, as did his demand for her to drive to a "romantic place—or else." Defendant reached over and grabbed Ray at the parking lot gate when he thought she was trying to exit the car, an action which gave an ominous cast to his repeated insistence that she was not free to leave the car until he "got what he wanted." Under these circumstances the trial court could properly have found a threat of force, and there was no need for Ms. Ray to risk injury by testing out those threats. While Ray's experiences with her former boyfriend may have increased her fear of physical harm, there was adequate evidence for the trial court to find that defendant himself threatened her.

In conclusion, the appellate court erred in barring the use of testimony based upon defendant's statements to Dr. Colen and Dr. Beck, and also erred in ruling that the State must demonstrate more than one act of sexual assault. In addition, we are convinced that there was sufficient evidence to establish defendant's sexually dangerous status beyond a reasonable doubt. We therefore reverse the judgment of the appellate court and affirm the judgment of the circuit court. We remand this cause to the circuit court of Peoria County for further proceedings.

Appellate court reversed;
circuit court affirmed;
cause remanded.

APPENDIX B

Sexually Dangerous Persons Act, Article 105 of the Code of Criminal Procedure (Ill. Rev. Stat. 1981, ch. 38, §105-1.01 et seq.).

105-1.01. Sexually dangerous persons--Definition

§1.01. As used in this Act:

All persons suffering from a mental disorder, which mental disorder has existed for a period of not less than one year, immediately prior to the filing of the petition hereinafter provided for, coupled with criminal propensities to the commission of sex offenses, and who have demonstrated propensities toward acts of sexual assault or acts of sexual molestation of children, are hereby declared sexually dangerous persons.

105-2. Jurisdiction

§2. Jurisdiction of proceedings under this Act is vested in the circuit courts in this State, for the purpose of conducting hearings for commitment and detention of such persons, as hereinafter provided.

105-3. Petition--Contents

§3. When any person is charged with a criminal offense and it shall appear to the Attorney General or to the State's Attorney of the county wherein such person is so charged, that such person is a sexually dangerous person, within the meaning of this Act, then the Attorney General or State's Attorney of such county may file with the clerk of the court in the same proceeding wherein such person stands charged with criminal offense, a petition in writing setting forth facts tending to show that the person named is a sexually dangerous person.

105-3.01. Civil nature of proceedings--Burden of proof--Procedure

§3.01. The proceedings under this Act shall be civil in nature, however, the burden of proof required to commit a defendant to confinement as a sexually dangerous person shall be the standard of proof required in a criminal proceedings of proof beyond a reasonable doubt. The provisions of the Civil Practice Act, and all existing and future amendments of that Act and modifications thereof and the Supreme Court Rules now or hereafter adopted in relation to that Act shall apply to all proceedings hereunder except as otherwise provided in this Act.

105-4. Examination by psychiatrist

§4. After the filing of the petition, the court shall appoint two qualified psychiatrists to make a personal examination of such alleged sexually dangerous person, to ascertain whether such person is sexually dangerous, and the psychiatrists shall file with the court a report in writing of the result of their examination, a copy of which shall be delivered to the respondent.

105-4.01. "Qualified psychiatrist"--Defined

§4.01. "Qualified psychiatrist" means a reputable physician licensed in Illinois to practice medicine in all its branches, who has specialized in the diagnosis and treatment of mental and nervous disorders for a period of not less than 5 years.

105-4.02. Psychiatric examination in counties less than 500,000--Costs

§4.02. In counties of less than 500,000 inhabitants the cost of the psychiatric examination required by Section 4 is a charge against and shall be paid out of the general fund of the county in which the proceeding is brought.

105-5. Jury trial, right to--Evidence

§5. The respondent in any proceedings under this Act shall have the right to demand a trial by jury and to be represented by counsel. At the hearing on the petition it shall be competent to introduce evidence of the commission by the respondent of any number of crimes together with whatever punishments, if any, were inflicted.

105-6. §6. Repealed by Laws 1955, p. 1144, eff. July 7, 1955.

105-7. Reserved.

105-8. Director of Corrections as guardian

§8. If the respondent is found to be a sexually dangerous person then the court shall appoint the Director of Corrections guardian of the person found to be sexually dangerous and such person shall stand committed to the custody of such guardian. The Director of Corrections as guardian shall keep safely the person so committed until the person has recovered and is released as hereinafter provided. The Director of Corrections as guardian shall provide care and treatment for the person committed to him designed to effect recovery. The Director may place that ward in any facility in the Department of Corrections or portion thereof set aside for the care and treatment of sexually dangerous persons. The Department of Corrections may also request another state Department or Agency to examine such patient and upon such request, such Department or Agency shall

also request another state Department or Agency to examine such patient and upon such request, such Department or Agency shall make such examination and the Department of Corrections may, with the consent of the chief executive officer of such other Department or Agency, thereupon place such patient in the care and treatment of such other Department or Agency.

105-9. Application showing recovery--Hearing--Discharge

§9. An application in writing setting forth facts showing that such sexually dangerous person or criminal sexual psychopathic person has recovered may be filed before the committing court. Upon receipt thereof, the clerk of the court shall cause a copy of the application to be sent to the Director of the Department of Corrections. The Director shall then cause to be prepared and sent to the court a socio-psychiatric report concerning the applicant. The report shall be prepared by the psychiatrist, sociologist, psychologist and warden of, or assigned to, the institution wherein such applicant is confined. The court shall set a date for the hearing upon such application and shall consider the report so prepared under the direction of the Director of the Department of Corrections and any other relevant information submitted by or on behalf of such applicant. If the patient is found to be no longer dangerous, the court shall order that he be discharged. If the court finds that the patient appears no longer to be dangerous but that it is impossible to determine with certainty under conditions of institutional care that such person has fully recovered, the court shall enter an order permitting such person to go at large subject to such conditions and such supervision by the Director as in the opinion of the court will adequately protect the public. In the event the person violates any of the conditions of such order, the court shall revoke such conditional release and recommit the person pursuant to Section 5-6-4 of the Unified Code of Corrections under the terms of the original commitment. Upon an order of discharge every outstanding information and indictment, the basis of which was the reason for the present detention, shall be quashed.

105-10. Conditional release--Petition--Revocation and re-commitment

§10. Whenever the Director finds that any person committed to him under this Act as now or hereafter amended, appears no longer to be dangerous but that it is impossible to determine with certainty under conditions of institutional care that such person has fully recovered, the Director of the Department of Corrections may petition the committing court for an order authorizing the conditional release of any person committed to him under this Act and the court may enter an order permitting such person to go at large subject to such conditions and such supervision by the Director as in the opinion of the court will

adequately protect the public. In the event the person violates any of the conditions of such order, the court shall revoke such conditional release and re-commit the person pursuant to Section 5-6-4 of the Unified Code of Corrections under the terms of the original commitment.

105-11. Partial invalidity

§11. If any provision of this Act, or the application of any provision to any person or circumstance, is held invalid, the remainder of the Act, and the application of such provision to other persons or circumstances, shall not be affected thereby.

105-12. Custody transferred from Department of Public Safety to Director of Corrections

§12. Persons heretofore committed to the Department of Public Safety are deemed transferred and committed to the custody of the Director of Corrections.